AGENDA ITEM

September 701

Insurance Disclosure Task Force – Final Report and Recommendations

DATE: September 14, 2007

TO: Members of the Board of Governors

FROM: James E. Towery, Chair, Insurance Disclosure Task Force
Saul Bercovitch, Staff Attorney
Jill Sperber, Director, Office of Mandatory Fee Arbitration

SUBJECT: Insurance Disclosure Task Force – Final Report and Recommendations

EXECUTIVE SUMMARY

In May 2005, State Bar President John Van de Kamp, in consultation with the California Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force to study 1) if there should be a requirement in California that attorneys disclose whether they maintain professional liability insurance; 2) if so, what the exact nature and scope of that requirement should be; and 3) what the best vehicle would be for creating and enforcing any such requirement.

In June 2006, upon recommendation of the Task Force, the Regulation, Admissions and Discipline Oversight Committee (RAD) approved a request to release proposed new insurance disclosure rules for public comment. In response to those public comments, the Task Force revised its recommendations. In May 2007, RAD approved the Task Force's request to release revised proposed insurance disclosure rules for public comment. The Task Force has met and considered the public comments on the revised proposed insurance disclosure rules, and now makes its final recommendations to the Board of Governors.

The Task Force recommends that 1) the Board adopt a new Rule of Professional Conduct, to be transmitted to the California Supreme Court for approval, requiring direct disclosure of the absence of insurance to a client; 2) the Board approve a new Rule of Court, to be transmitted to the California Supreme Court for adoption, requiring attorneys to certify to the State Bar whether they have insurance, and providing that the State Bar will make publicly available the identity of individual attorneys who inform the State Bar that they do not have insurance; 3) the State Bar develop public educational material concerning professional liability insurance, to complement any insurance disclosure requirement; 4) the State Bar, as part of an expanded insurance-related package, study a) methods of making professional liability insurance more affordable and widely available to attorneys; and b) additional means of compensating clients who are harmed by uninsured attorneys; and 4) the State Bar assess the effect of the proposed insurance disclosure rules and prepare a report on that effect within three to five years after adoption of the proposed rules.

For further information on this item, contact Saul Bercovitch at (415) 538-2306 or by email at Saul.Bercovitch@calbar.ca.gov, or Jill Sperber at (415) 538-2023 or by email at Jill.Sperber@calbar.ca.gov.

I. BACKGROUND

A. Task Force creation and charge

In September 2004, Robert Welden, Chair of the ABA's Standing Committee on Client Protection, sent a letter to Chief Justice Ronald M. George, advising him that the ABA House of Delegates had adopted the ABA *Model Court Rule on Insurance Disclosure*, and expressing his hope that the California Supreme Court consider implementing the ABA Model Court Rule or an equivalent rule. A copy of that letter was sent to the State Bar's Executive Director, Judy Johnson, along with the accompanying information providing additional detail about the ABA rule and related developments in other states.

Following receipt of Mr. Welden's letter, State Bar President John Van de Kamp, in consultation with the Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force. The Task Force was created to study the following issues:

1. Should there be a requirement in California that attorneys disclose whether they maintain professional liability insurance?

2. If so, what should the exact nature and scope of that requirement be?

3. What is the best vehicle for creating and enforcing any such requirement?

Task Force recommendations for any new rules were to be presented to the Board of Governors and, if approved, to the Supreme Court.

B. Task Force composition

The Task Force includes attorneys from different segments of the Bar, representatives from the Legislature and the Supreme Court, and a public member who represents consumer groups. The participants in the Task Force are:

Chair:
James E. Towery, Hoge, Fenton, Jones & Appel, San Jose

Members:
Mary Alexander, Mary Alexander & Associates, San Francisco

Chris Bjorklund, public member, San Francisco

Kevin DeSantis, Butz, Dunn, DeSantis & Bingham, San Diego

Douglas Hendricks**,** Morrison & Foerster LLP, San Francisco

Beth Jay, California Supreme Court, San Francisco

Drew Liebert, Assembly Judiciary Committee, Sacramento

Maralee MacDonald, Boutin Dentino Gibson Di Giusto Hodell Inc., Sacramento

Edith Matthai, Robie & Matthai, Los Angeles

Steven Mehta, Mehta & Mann, Valencia

Frank Pitre, Cotchett, Pitre, Simon & McCarthy, Burlingame

Russell Roeca, Roeca, Haas & Hager, San Francisco

Terrie Robinson, attorney, Sacramento[1]

Francis S. Ryu, Law Offices of Francis S. Ryu Los Angeles

Gene Wong, Senate Judiciary Committee, Sacramento

Staff:
Saul Bercovitch, Staff Attorney, State Bar of California

Jill Sperber, Director, Office of Mandatory Fee Arbitration, State Bar of California

The Task Force also coordinated with a staff and member liaison from the State Bar Commission for the Revision of the Rules of Professional Conduct, because the work of the Task Force involved the potential development and adoption of a new Rule of Professional Conduct.

C. Summary of final Task Force recommendations

The historical background, process of developing the Task Force recommendations, and details concerning those recommendations are discussed in the remainder of this Agenda Item. In summary, those recommendations are:

1. California should adopt an insurance disclosure requirement.[2]

    A. The required disclosure concerning insurance should be made a) directly to the client; and b) to the State Bar, which will make the information publicly available on the State Bar's website or by a similar method.

[1] Ms. Robinson resigned from the Task Force before its August 27, 2007 meeting because she was unable to participate actively.

[2] The proposed new insurance disclosure rules are attached as Attachments A and B to this Agenda Item.

B. Attorneys should be required to make the insurance disclosure to clients – directly, and indirectly through the State Bar – only when they know or should know that they do *not* have by professional liability insurance.

C. Two companion rules should be adopted. A new Rule of Professional Conduct should require direct disclosure of the absence of insurance to a new client and a returning client with a new engagement. A new Rule of Court should require attorneys to certify to the State Bar whether they have insurance, and provide that the State Bar will make publicly available the identity of individual attorneys who inform the State Bar that they do not have insurance.

D. Failure to comply with the new Rule of Court in a timely fashion should result in non-disciplinary, administrative suspension. Attorneys who know or should know that the information supplied in response to the new Rule of Court is false should be subject to appropriate disciplinary action. Violation of the new Rule of Professional Conduct would implicate all the remedies that otherwise apply to a violation of the Rules of Professional Conduct, so there is no need to create a specific remedy.

E. Attorneys who are employed as government lawyers or in-house counsel and do not represent or provide legal advice to clients outside that capacity should be exempt from the insurance disclosure requirements.

F. Under both rules, attorneys should be required to provide notice of changed circumstances within thirty days of the change.

2. The State Bar should develop public educational material concerning professional liability insurance, to complement any insurance disclosure requirement.

3. The State Bar, as part of an expanded insurance-related package, should study a) methods of making professional liability insurance more affordable and widely available to attorneys; and b) additional means of compensating clients who are harmed by uninsured attorneys.

4. The State Bar should assess the effect of the proposed insurance disclosure rules and prepare a report on that effect within three to five years after adoption of the proposed rules.

D. Historical background and developments in other states

1. California history of insurance disclosure obligation (Business and Professions Code Sections 6147 and 6148)

California initially had a form of required insurance disclosure that commenced in 1992. A sunset clause was added to the statue in 1993, and the statute was repealed by its own terms, effective January 1, 2000. There has been no insurance disclosure requirement in California since that date.

In 1992, the malpractice insurance disclosure requirement was added to Business and Professions Code Section 6147 (governing contingency fee contracts) and Section 6148 (governing non-contingency fee contracts) through the enactment of SB 1405 (Presley), a “mini-omnibus” bill sponsored by Bar Discipline Monitor Robert Fellmeth.

For contingency fee cases and those non-contingency fee cases in which it was reasonably foreseeable that total expenses to a client would exceed $1,000, the written contract between the attorney and the client had to include:

> “A statement disclosing whether the attorney maintains errors and omissions insurance coverage applicable to the services to be rendered and the policy limits of that coverage if less than one hundred thousand dollars ($100,000) per occurrence up to a maximum of three hundred thousand dollars ($300,000) per policy term.”

In 1993, the California Trial Lawyers Association (now Consumer Attorneys of California) sought to eliminate the malpractice insurance disclosure requirement through an amendment contained in the State Bar's fee bill at the time, SB 373 (Lockyer). Ultimately, the statutory disclosure language was modified and included in SB 645 (Presley), and a sunset clause was inserted, repealing the disclosure requirement effective January 1, 1997, unless specifically extended. The modified statutory language, effective January 1, 1994, required the following in the written contract between the attorney and the client:

> “If the attorney does not meet any of the following criteria, a statement disclosing that fact:
> (A) Maintains errors and omissions insurance coverage.
> (B) Has filed with the State Bar an executed copy of a written agreement guaranteeing payment of all claims established against the attorney by his or her clients for errors or omissions arising out of the practice of law by the attorney in the amount specified in paragraph (c) of subdivision (1) of Section B of Rule IV of the Law Corporation Rules of the State Bar. The State Bar may charge a filing fee not to exceed five dollars ($5).
> (C) If a law corporation, has filed with the State Bar an executed copy of the written agreement required pursuant to paragraph (a), (b), or (c) of

subsection (1) of Section B of Rule IV of the Law Corporation Rules of the State Bar."

The August 24, 1993 Assembly Judiciary Committee analysis of SB 645 provides some insight into the issues that were raised:

> "Recently, the Committee amended SB 373 (Lockyer), the State Bar dues bill, to delete the existing disclosure requirement pertaining to malpractice insurance. Basically, it was concluded that the disclosure requirement was too simplistic and may, in some instances, actually mislead consumers. The proposal in SB 645 eliminates many of the concerns about the existing requirement. For example, issues concerning coverage disputes, or whether defense costs are inside or outside limits no longer pertain. SB 645 merely requires the forthright disclosure that no insurance, in an[y] amount, is maintained. However, some unfairness and difficulty persists. For example, some attorneys are unfairly canceled, or not renewed. Clients may not understand the nature of a claims made policy. A claim filed after an existing policy lapses will be uncovered. An attorney who honestly informs a client that he or she has insurance is under no continuing obligation to inform the client that the attorney has lost his or her coverage, reduced limits, or obtained coverage that excludes certain areas of practice. The California Trial Lawyers Association (CTLA) has expressed concern about the 'partial reinstatement' of the disclosure requirement. The delayed effective date will provide an opportunity to negotiate a more complete solution to this problem before the disclosure requirement activates."

In 1996, the State Bar sponsored AB 2787 (Kuehl), a successful omnibus bill that contained an extension of the sunset clause for an additional three years. The August 5, 1996 Senate Judiciary Committee analysis states:

> "This provision extends for three years the sunset on malpractice disclosure requirement. The provisions of the Business & Professions Code requiring an attorney to disclose in his or her contingent fee agreement or other contract fee agreement the fact that he or she is unwilling to guarantee financial responsibility for professional errors and omission will sunset on January 1, 1997. The way the sunset clause was drafted, the pre-existing disclosure requirement would not be resurrected; rather, all statutory malpractice insurance/guarantee disclosure requirements would disappear. The disclosure language scheduled to sunset was added through the enactment of SB 645 (Presley), Chapter 982, Statutes of 1993. It replaced far more vague and onerous malpractice disclosure requirements added the year before."

No later legislation was sponsored to extend or repeal the sunset clause, and the malpractice insurance disclosure requirement was repealed by its own terms, effective January 1, 2000.

2. ABA Model Court Rule on Insurance Disclosure

On August 9, 2004, the ABA House of Delegates adopted the *ABA Model Court Rule on Insurance Disclosure*. The Model Court Rule requires attorneys to disclose on their annual registration statements whether they maintain professional liability insurance, and provides that the information submitted by attorneys will be made available to the public. Attorneys who fail to comply with the rule in a timely fashion may be suspended until they comply, and supplying false information subjects an attorney to appropriate disciplinary action. The Report accompanying the Model Court Rule also suggests that the bar educate the public about the nature of legal malpractice insurance.[3]

3. Insurance disclosure obligations in other states

According to a survey compiled by the ABA's Standing Committee on Client Protection, twenty-two states have adopted some form of an insurance disclosure requirement. Three states, other than California, are currently considering a disclosure requirement.

Five of the states with an insurance disclosure requirement have amended their Rules of Professional Conduct to require attorneys to disclose directly to their clients if the attorneys do not maintain a minimum level of professional liability insurance (Alaska, New Hampshire, Ohio, Pennsylvania, and South Dakota). Kentucky was considering a proposed rule with this approach, but the Kentucky Supreme Court rejected that proposal in 2006. A new insurance proposal is currently under consideration in Kentucky.[4]

Sixteen of the states with an insurance disclosure requirement have followed the ABA model, and require attorneys to disclose on their annual registration statements whether they maintain professional liability insurance (Arizona, Delaware, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, Rhode Island, Virginia, Washington, and West Virginia). In fourteen of those states, the information is made available to the public, in some cases by posting on the State Bar website, but in others upon inquiry only. In two of those states, the information is not made available to the public. Three other states are considering the approach of the ABA model (New York, North Dakota, and Vermont).

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[3] The ABA Model Court Rule and accompanying Report are included as Attachment 1 in the Appendix to this Agenda Item.

[4] One issue in Kentucky is whether the state should adopt a mandatory insurance rule, as opposed to an insurance disclosure rule.

Utah has not adopted a rule, but the Utah Supreme Court issued an order, upon a petition filed by the Utah State Bar, that specifies inclusion of malpractice insurance questions on the attorney licensing forms for the 2007-08 and 2008-09 licensing years. Those questions must be answered for the licensing form to be accepted as complete. The information provided will be for the use of the Utah Supreme Court and the Utah State Bar and will not be made public.[5]

On January 21, 2006, the House of Delegates of the Arkansas Bar Association voted not to adopt an insurance disclosure rule. The proposal, which would have followed the ABA Model Court Rule, was approved by the Bar's Board of Governors, but was defeated in the House of Delegates by a vote of 29 against to 14 in favor, with about 12 abstentions.

Oregon remains the only state that requires lawyers to carry malpractice insurance.

4. Survey of experience in other states that have adopted an insurance disclosure requirement

The public comments on the proposed insurance disclosure rules predict a variety of consequences resulting from adoption of those rules. During the development of the Task Force recommendations, members of the Board of Governors and others expressed an interest in obtaining information about the experience in other states that have adopted an insurance disclosure requirement, to assist in evaluating those predictions. A set of questions was therefore drafted and sent to contacts in those other states.[6] The survey questions focused on the following key issues:

1) any increase in the assertion of malpractice claims against attorneys;

2) any increase in the cost of legal services;

3) any decrease in access to low-cost legal services, or any limitation on legal services being provided to certain segments of clients;

4) any impact on the ability of attorneys to maintain their law practice, as it existed before the insurance disclosure requirement was adopted;

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[5] The Utah Supreme Court order states, in part: "The Court is considering possible future imposition of a rule requiring malpractice insurance. The data from the malpractice insurance questions is being colleted to assist the Court in its consideration of this issue."

[6] The survey questions are included as Attachment 2 in the Appendix to this Agenda Item. The survey was sent to State Bar contacts (asking about each contact's particular state) and to insurance contacts involved with providing professional liability insurance to attorneys in states with a disclosure requirement (asking about any of those states).

5) any decrease in the percentage of uninsured attorneys who are practicing law; and

6) any impact on the private insurance market, e.g. carriers entering or leaving the market, premiums for professional liability insurance increasing or decreasing.

The survey also included an open-ended question on whether any of the states had noted any other impact, positive or negative, and questions covering steps, if any, the states had taken to address a) the uninsured attorney; and b) the issue of affordable professional liability insurance. The survey questions were designed to distinguish between a measurable impact (e.g., through collection of specific data or other information) and insufficient information to respond.

The following is a summary of the responses:

Alaska and South Dakota – Attorneys Liability Protection Society (ALPS) analyzed the impact when South Dakota and Alaska first adopted their rules. ALPS did not note any increase in the assertion of malpractice claims against attorneys or any increase in the cost of legal services. ALPS has not noted any decrease in the percentage of uninsured attorneys who are practicing law. Competition in the private insurance market has remained about the same.

Delaware – The rule requires disclosure to the Supreme Court on the annual registration statement. No studies have been conducted to measure the impact.

Idaho, Illinois, Ohio and Michigan (one response from agency writing business in all four states) – No studies have been conducted to respondent's knowledge and no data is available to respond to most of the questions. There appears to be no change in the ability of attorneys to maintain their law practice, and has been no change in the private insurance market. None of the states has a carrier of last resort and, to respondent's knowledge, none has set up a fund to pay for attorneys who lack coverage. None of the states has taken steps to address the cost of malpractice insurance. The respondent says that “for most attorneys this is not an issue. The market place has done a good job to keep prices very competitive.”

New Hampshire – Has not measured the impact, but has not noted any increase in the assertion of malpractice claims; increase in the cost of legal services; decrease in access to low-cost legal services or any limitation on legal services being provided to certain segments of clients; impact on the ability of attorneys to maintain their law practice; or impact on the private insurance market. The New Hampshire Bar Association has long discussed the issue of affordable insurance, but there has been no official outcome, as far as the respondent is aware.

North Carolina – No studies have been conducted to measure the impact and there is insufficient information to respond. No steps are being taken to address the uninsured attorney or the issue of affordable insurance.

South Dakota (response from State Bar) – For ten years, South Dakota has had a rule requiring direct disclosure to clients. South Dakota also has an annual report whereby all lawyers must disclose whether they have insurance to the Bar only. There is no empirical evidence of the percentage with malpractice insurance prior to the adoption of the rule, although they suspect it was around 80%. Since adoption of the rule, just over 96% maintain malpractice insurance as reflected in the annual filings and confirmed through an anonymous survey. They have not noted any increase in malpractice claims. They have not noted any increase in the cost of legal services. They have not noted any decrease in access to low-cost legal services. To the contrary, their pro bono program continues to expand. There are two identifiable groups that comprise the majority of lawyers practicing without insurance: young recent graduates of law school (primarily solos), and senior lawyers (almost all solos) who have reduced their practice to a part-time basis. Some senior lawyers have chosen to fully retire rather than disclose the lack of insurance to their few remaining clients (where the lawyer had chosen a sharply curtailed practice). They have noted no material change in the insurance companies choosing to conduct business in South Dakota nor have they noted any material change in premiums. They have not had any complaints that a lawyer filed a false statement with the Bar claiming insurance coverage with a subsequent malpractice claim revealing that there was no insurance. There is no negative of which they are aware, other than noted above where some senior lawyers have fully retired rather than handling a few cases for which malpractice insurance would not be cost effective. "On a positive note, 96% of our private practitioners are maintaining malpractice insurance, thus protecting the public." They are unaware of any lawyers unable to obtain malpractice insurance although anecdotally, they know that those with public discipline have premiums that run two to three times average - but as far as they know, that has always been the case even without the disclosure rule.

Virginia – ALPS reported that Virginia is presently in the process of looking at the issue of mandating professional liability insurance coverage for all lawyers.

West Virginia – No measurement has been taken of the impact of the disclosure rule, and insufficient information is available to respond. No steps are being considered or taken to address the uninsured attorney or the issue of affordable insurance.

Washington – The rule has been in effect since July 1, 2007. No reaction or impact had been reported as of July 30, 2007, the date of the response.

E. Supplementary background material

Before formulating its initial recommendations, the Task Force reviewed supplementary background material to assist in evaluating the categories of attorneys who would be most affected by an insurance disclosure requirement, where the greatest

impact is likely to fall, and the overall context in which a disclosure requirement would operate.[7]

The Task Force inquired into the percentage of practicing attorneys who are uninsured. Although it is difficult to obtain hard data regarding the percentage of uninsured attorneys in California, the Task Force Chair noted that estimates are in the range of about 20 percent.[8] Available data from other states was reviewed, and the Task Force took particular note of data from Illinois showing that 40% of solo practitioners did not maintain malpractice insurance, as compared with 4% of those in firms of 2-10 attorneys, .7% of those in firms of 11-25 attorneys, and 1% of those in firms with more than 25 attorneys.

The Task Force also considered 1) the legal areas in which the majority of malpractice claims against attorneys arise, and the types of claims that most often arise; 2) the member groups that are most likely to experience the malpractice claims; 3) the range of remedies available to a client based on harm resulting from an attorney's negligence or other misconduct, including the Client Security Fund, an attorney's professional liability insurance, and restitution arising out of disciplinary proceedings; 4) existing Rules of Professional Conduct that have a client disclosure component; and 5) the existing types of non-disciplinary, administrative suspensions based on non-compliance with other professional obligations in California, such as a failure to comply with MCLE requirements or pay State Bar dues.

F. Process of developing Task Force recommendations

1. Initial Task Force proposal

At its first meeting, on June 29, 2005, the Task Force reviewed the history of an insurance disclosure obligation in California and the insurance disclosure rules proposed and adopted by the ABA and other states. The Task Force was then polled on the initial question of whether it should move forward and take action with respect to recommending that some sort of disclosure be required about an attorney's maintenance of professional liability insurance, or whether it should take no action and leave things as they are. Although one Task Force member expressed the view that it was premature to move forward, a consensus was reached that the Task Force should take some action on an insurance disclosure requirement, leaving aside for the moment the details of any disclosure requirement.

At its second meeting, on September 27, 2005, the Task Force was polled again at the beginning of the meeting on the initial question of whether it should move forward

[7] The supplementary material provided to the Task Force for its September 27, 2005 meeting is included as Attachments 3 – 14 in the Appendix to this Agenda Item.

[8] A *California Bar Journal* survey from September 2001 that was based on interviews with 1,500 members found that 18% of those in private practice did not maintain professional liability insurance.

and recommend that some sort of insurance disclosure requirement be adopted in California. The Task Force confirmed the consensus reached during the June 29, 2005 meeting, and proceeded to discuss the specific details of the proposed insurance disclosure rules, addressing each key element separately: 1) whether the required disclosure should be made directly to the client, to the State Bar, or to both; 2) whether attorneys should be required to disclose to clients a) the presence or absence of insurance coverage, or a) only the absence of insurance coverage; 3) what the best mechanism for creating and enforcing an insurance disclosure requirement is, and what the sanctions for noncompliance should be; 4) what categories of attorneys, if any, should be exempt from an insurance disclosure requirement; and 5) what other details should be addressed in the rules, to provide clear and uniform guidance to attorneys. Upon consideration of these issues, the Task Force decided to recommend two proposed insurance disclosure rules – one requiring direct disclosure to the client if an attorney is not covered by professional liability insurance, and the other requiring disclosure to the State Bar, to be followed by the public's ability to ascertain if an attorney is not covered by professional liability insurance.

The Task Force also considered various ways in which an insurance disclosure requirement could be made more useful to consumers, and decided to recommend that the State Bar develop general educational information about professional liability insurance, to complement any insurance disclosure requirement.

The recommendations formulated at the September 27, 2005 Task Force meeting are contained in the initial *Task Force Report and Recommendations*, presented to the Regulation, Admissions and Discipline Oversight Committee (RAD) in June 2006. RAD approved a request to release the proposed insurance disclosure rules for a 90-day public comment period.

2. Public comments on initial Task Force proposal

The State Bar received 112 comments in response to the June 2006 proposed insurance disclosure rules.[9] Most of the comments came from individual attorneys, but some came from committees, groups, or other organizations. The vast majority of the comments (approximately 78.5%) opposed the proposal in whole or in part. Approximately 14% of the comments supported the proposal. A few comments offered drafting suggestions but did not take a position.

3. Revised Task Force proposal

The Task Force held its third meeting, on February 16, 2007, to consider the public comments and develop further recommendations. Given the nature and scope of the public comments, the Task Force did not take anything in the June 2006 proposal as a given. The Task Force began its discussions by returning to the initial question of whether California should adopt any insurance disclosure requirement. The Task Force

[9] The overarching themes contained in the public comments received in response to the initial June 2006 insurance disclosure proposal and the revised May 2007 proposal are summarized in Section I.G, below.

fully considered the public comments but nonetheless concluded, as it had before, that the important goal of client protection would be advanced by an insurance disclosure requirement, and that this goal outweighed the concerns expressed about imposing any such requirement. The Task Force then proceeded to address the remaining key questions, in light of the public comments.

Ultimately, the Task Force decided to recommend retaining the basic structure of its June 2006 proposal, for the same fundamental reasons set forth in its June 2006 *Report and Recommendations*. The Task Force did, however, recommend modifications to some particular aspects of the initial proposal, in response to concerns raised in the public comments. Specifically, the Task Force made the following recommendations:

1) The proposed rules should be revised to change "covered by" professional liability insurance to "have" or "has" professional liability insurance, in response to public comments expressing concern that the term "covered by" is in essence a legal conclusion, and a determination of whether a particular claim against an attorney is ultimately "covered by" insurance is based upon a multitude of facts and circumstances, including the nature of the claim, the timing of the claim, and the terms and conditions of the particular insurance policy at issue;

2) The proposed rules should be revised so that disclosure is required if an attorney "knows or should know" that he or she does not have professional liability insurance, in response to comments expressing opposition on the grounds that the proposed rules could penalize otherwise innocent attorneys who believe in good faith that they are in full compliance with the rules;

3) The proposed Rule of Professional Conduct should be revised so it applies prospectively only, to new clients and new engagements with returning clients, in response to several concerns expressed about the proposed rule's requirement to inform "existing" clients in writing within thirty days of the effective date of the new rule if an attorney is not covered by professional liability insurance. Those concerns included negative intrusion into an already existing relationship between the attorney and client, significant time and cost involved in notifying existing clients, which could be prohibitive, and definitional issues relating to an "existing" client;

4) The requirement for a signed acknowledgment from the client should be deleted from the proposed Rule of Professional Conduct. The Task Force believes that requiring written notice to the client provides adequate client protection, and will be a sufficient means of minimizing evidentiary issues in the event a dispute arises about the fact of the disclosure;

5) The rule requiring disclosure to the State Bar should be revised so it requires attorneys to disclose to the State Bar whether they have insurance *only* when they "represent or provide legal advice to clients," consistent with the intent of the proposal; and

6) The title of both rules should be changed from “Insurance Disclosure” to “Disclosure of Professional Liability Insurance.”

During its February 16, 2007 meeting, the Task Force also discussed an expanded insurance-related package, beyond the proposed rules themselves. The Task Force confirmed its earlier recommendation that the State Bar develop public educational material and discussed a potential expansion of that material to address a variety of issues raised by the public comments such as, for example, reasons why an attorney may choose not to purchase professional liability insurance. In response to issues raised in the public comments about affordable insurance and claims of malpractice against uninsured attorneys, the Task Force added an additional recommendation that the Board of Governors, as part of an expanded insurance-related package, study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys.

The recommendations formulated at the February 16, 2007 Task Force meeting are contained in the *Task Force Report and Recommendations upon Return from Public Comment*, presented to RAD at its April 27, 2007 meeting. RAD approved a request to release for public comment two proposed insurance disclosure rules, revised as discussed above. The revised proposed rules were released for a 90-day public comment period.

4. Public comments on revised Task Force proposal

When the revised insurance disclosure rules were posted for public comment, the public comment posting noted that 1) the State Bar received extensive comments on the initial June 2006 proposal; 2) the Task Force fully considered those public comments; and 3) the focus of the second public comment period was the proposed amendments to the proposed insurance disclosure rules. Notice of the revised proposal and deadline for submitting comments was sent to all of those who commented on the initial proposal.

The State Bar received ninety-five comments on the revised proposed insurance disclosure rules.[10] Twenty-four of those comments came from groups or individuals who commented on the initial proposal.[11] The vast majority of the comments from those who had not commented before (approximately 78%) opposed the proposal in whole or in part. Approximately 10% of those who had not commented before supported the proposal. Of those who had commented on the initial proposal, nineteen confirmed

[10] Two of those comments were received after the comment deadline and after the final Task Force meeting on August 27, 2007, but those comments have been provided to the Task Force and the Board of Governors.

[11] The comment chart provided to the Task Force and the Board of Governors shows whether the commenting group or individual commented on the initial June 2006 proposal.

previous opposition, and two confirmed previous support. A few comments raised technical issues or suggested modifications. The Center for Public Interest Law and HALT – An Organization of Americans for Legal Reform both commented in support of the initial proposal, and continued to support the insurance disclosure requirements, but opposed some of the proposed revisions as weakening the initial proposal. One individual who had not commented before disagreed with two points raised by the proposed amendments to the initial proposal (the elimination of the requirement to notify "existing" clients, and the requirement to obtain a signed acknowledgment from the client).

Almost all of the comments – both in favor of and opposed to the revised proposal – addressed the basic concept of the proposed insurance disclosure rules, but did not specifically address the proposed amendments. Eight comments noted the proposed amendments, but generally stated a view that the amendments were insignificant, and generally confirmed a previous view of the disclosure proposal. Ten comments addressed issues raised by the proposed amendments.

5. Final Task Force proposal

On August 27, 2007, the Task Force met to consider the public comments received in response to the revised insurance disclosure proposal and to determine any further recommendations. As with the other three Task Force meetings, all issues remained open for discussion.

The Task Force noted in particular the comments addressing issues raised by the proposed amendments, and focused on comments concerning the proposed change from "covered by" professional liability insurance to "have" or "has" professional liability insurance.[12] The Task Force discussed different factual scenarios, but the basic question raised was the same: When an attorney does not have his or her own separate professional liability insurance policy, but is performing legal services that are insured through a liability policy provided by another entity (such as an employer, appointing entity, or other provider of legal services), will the attorney be required to notify clients under the Rule of Professional Conduct, and the State Bar under the Rule of Court, that he or she does not "have" insurance? Stated otherwise, the comments raised a question concerning the change in the proposed rules from "covered by" insurance to "have" or "has" insurance.[13]

[12] The comment from HALT supports the initial proposal but opposes some of the proposed amendments as weakening the initial proposal. That comment was received after the comment deadline and after the August 27, 2007 Task Force meeting, so it was not considered during that meeting.

[13] Some of the rules in other states use "have" insurance, some use "covered by" insurance, and some use "maintain" insurance. South Dakota's rule uses more than one term. It requires notice to a client if an attorney does not "have" professional liability insurance with limits of at least $100,000, by disclosing that the attorney "is not covered by" professional liability insurance.

The proposed change to "have" or "has" insurance was not intended to trigger a disclosure obligation in cases where an attorney is performing legal services that are insured through a liability policy provided by some other entity. The proposed change was made in response to comments expressing concern that the term "covered by" is in essence a legal conclusion, and that a determination of whether a particular claim against an attorney is ultimately "covered by" insurance is based upon a multitude of facts and circumstances.

In light of the public comments on the revised proposal, the Task Force again discussed the relative pros and cons of "have" insurance versus "covered by" insurance but concluded that the proposal should retain the "have" insurance language, for the reasons raised in the public comments on the initial proposal and previously discussed. At the same time, the Task Force recognized that adoption of the proposed new insurance disclosure rules could give rise to questions by attorneys who are seeking to comply but are not clear about the intent of the rules as applied to some particular set of circumstances. To address that issue, the Task Force believes the implementation plan for the proposed new rules should include ongoing explanatory material, such as Frequently Asked Questions or other guidelines, to clarify particular issues that may come up.

The Task Force also discussed the overall insurance disclosure proposal, in light of all the public comments, and focused its attention on comments predicting that adverse consequences will result from adoption of the rules, with a disproportionate impact on solo and small firm practitioners, minority attorneys, newly admitted attorneys, and female attorneys, and a negative impact on access to legal services by lower-income and indigent clients. To assist in gauging those predictions, the Task Force examined the survey responses from the other states that have adopted an insurance disclosure requirement.[14] The Task Force recognized that it is important not to overstate the results of the survey responses, given the lack of specific studies or data, but found that the lack of reports of negative consequences was telling. South Dakota, in particular, adopted a strict disclosure rule ten years ago and reported that it was not aware of any negative impact, other than some senior lawyers fully retiring rather than handling a few cases for which malpractice insurance would not be cost effective.[15]

The Task Force recognized, however, that the public comments raised the possibility of adverse consequences that should be monitored.[16] The Task Force

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[14] The response from New Hampshire was not received until after the August 27, 2007 Task Force meeting, so it was not considered during that meeting.

[15] In South Dakota, the absence of insurance must be disclosed on a lawyer's letterhead and in every written communication with a client.

[16] One recurring public comment noted a potentially adverse impact on low-income and indigent clients. The Task Force discussed the fact that a consumer's right to know about the absence of insurance may be particularly significant when the consumer is *least able* to absorb financially any harm resulting from an attorney's professional negligence. The goal of the insurance disclosure proposal would therefore

therefore decided to add one more recommendation to its proposal, which is that the State Bar assess the effect of the proposed new rules and prepare a report on that effect within three to five years after the proposed rules are adopted. Such assessment could cover concerns expressed in the public comments and include, among other things, an evaluation of the same issues raised in the survey questions sent to the other states.

With the above considerations in mind, the Task Force voted unanimously to recommend adoption of the proposed insurance disclosure rules, as released for public comment in May 2007. The Task Force also reconfirmed its earlier recommendations that 1) the State Bar develop public educational material concerning professional liability insurance; and 2) the Board of Governors study a) methods of making professional liability insurance more affordable and widely available to attorneys, and b) additional means of compensating clients who are harmed by uninsured attorneys.

G. Summary of public comments on proposed insurance disclosure rules

All of the public comments on the initial and revised insurance disclosure proposals were sent to the Task Force, along with corresponding charts summarizing those comments. The same material was posted electronically for the Board of Governors in connection with the September 26, 2007 Board meeting, and hard copies have been made available upon request. While attempts to summarize the 207 comments could not capture the full scope, the nuances, or the tone of those comments, certain recurring and overarching themes appear throughout the comments. This summary is not intended to be a substitute for the comments, but is provided to highlight the central themes.

1. Comments opposed to the proposed insurance disclosure requirements

- <u>There is no evidence of a problem</u>

There is no evidence that a problem exists under current law. No evidence has been presented regarding the number of malpractice claims that are not satisfied due to lack of insurance or other assets. Clients do not base their decision to hire an attorney on whether the attorney has malpractice insurance. An attorney's competence to handle the client's legal matter is, among other factors, more significant. If a client wants to know whether an attorney has insurance, the client can always ask.

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help, not hurt, low-income and indigent clients (as well as other clients) because the clients would be better informed. A client's level of protection should not be lower, simply because he or she is low-income or indigent.

- The proposal will have an unfair impact on certain segments of the bar

The proposal unfairly targets segments of the bar that are most likely to be uninsured. Those mentioned include solo and small firm practitioners, newly admitted attorneys, minority attorneys, and part-time attorneys.

- The proposal will stigmatize uninsured attorneys

The proposed rules will unfairly stigmatize uninsured attorneys, and clients will draw unwarranted inferences from the mere absence of insurance. Even though the proposal does not mandate insurance coverage, it will compel attorneys to obtain insurance to avoid that stigma, and place attorneys lacking insurance at an unfair competitive disadvantage.[17]

- There will be an adverse impact on access to justice

The required disclosures will have an adverse economic impact on consumers, and will adversely affect access to justice. When confronted with the added cost of malpractice insurance, attorneys will be faced with the dilemma of either passing that cost on to their clients or absorbing it themselves. If the cost is passed on, clients of solo and small firms in particular – including segments of the population who are least capable of affording legal services – will face an increase in the cost of legal services. If the cost is absorbed, the least prosperous portion of the bar will become even less profitable and some may be driven out of the practice of law, leaving fewer choices for consumers.

- The disclosure requirements will be misleading

The proposed disclosures may mislead the public. Stating whether you "have insurance" is often not a yes or no answer. Malpractice insurance is subject to many vagaries as to the existence and adequacy of coverage. Given the claims-made nature of malpractice policies, having insurance at the time of the engagement may mislead the client into believing that coverage will be available when a claim is later made, which may not be the case. The proposed rules will create a false sense of security and provide the perception that any attorney not disclosing the absence of malpractice coverage is "completely" and "appropriately" covered. Attorneys who do *not* disclose the *absence* of coverage will be put at risk for allegedly misleading disclosures about the *presence* of coverage, made either implicitly or explicitly.

- The disclosure requirements are incomplete

If consumer protection and "informed consent" are the point, all attorneys should be required to disclose the presence *or* absence of insurance (and, some comments

[17] A number of comments express the view that the proposal is in essence a "ploy" to mandate insurance coverage for all attorneys.

say, the amount of coverage and other details if the attorney has insurance), so that clients can be fully informed.

- Malpractice lawsuits will increase

The proposed rules will encourage malpractice lawsuits. Some comments state that the rules will stir up litigation by targeting the *insured* attorney, given the availability of an insurance recovery. Others state that *uninsured* attorneys will be targeted by questionable malpractice claims for the purpose of forcing a quick settlement, given that personal assets will be at risk.

- The regulation is unjustified

No other professional is required to inform a client if he or she does not have liability insurance.

- Alternatives to insurance should be considered

Adequate self-insurance and alternatives such as bonds should be included as options.

- Affordable insurance is not available

A disclosure requirement is unfair unless affordable insurance is made available to all attorneys.

- The dual disclosure requirement is unnecessary

Some comments are not opposed to both forms of proposed disclosure, but do oppose one form. Although some of those comments favor disclosure to the State Bar only, most of the comments opposing one of the proposed forms of disclosure object to public posting on the State Bar website in particular. Concerns raised include 1) website posting will result in many consumers making decisions based *solely* on the public disclosure, without being fully informed of the facts and circumstances surrounding the absence of insurance that might otherwise impact the consumer's decision to hire a particular attorney; 2) there is a potential for misuse and abuse of the information on the website; and 3) uninsured attorneys will be bombarded by both legitimate and bogus solicitations regarding insurance and other matters.

2. Comments in support of the proposed insurance disclosure requirements

- Absence of insurance is a material fact

The absence of professional liability insurance is material (some comments say significant), potentially affecting the client's interest and decision about hiring a

particular attorney. Clients have a right to know material facts in making the decision to hire an attorney. The disclosure requirements will only have an adverse impact on uninsured attorneys if one assumes many clients with the information would not hire the attorney, thereby making the case that the information is material.

- Clients of uninsured attorneys often have no remedy

As a practical matter, clients have no viable remedy when they have been damaged by an uninsured attorney's malpractice. Plaintiffs' attorneys will not take the case, lacking a monetary recovery at the end. The problem should therefore not be framed in terms of unsatisfied malpractice claims or judgments because these cases often go away at the outset, without anyone ever knowing about them.

Clients with claims against *insured* attorneys have at least *some* recourse. While no client is guaranteed that he or she will prevail on a claim against an attorney or that a valid claim will be covered by insurance, the vast majority of clients with valid legal malpractice claims against insured attorneys have at least some recourse.

- Disclosure enhances informed consumer decisions

The disclosure requirements will serve to inform clients when an attorney or prospective attorney is uninsured. By making that information available, a client will have better information to make an informed decision when choosing an attorney. Attorneys without insurance are not "selling the same product" as attorneys with insurance, and the client should be so informed. Many clients assume attorneys have professional liability insurance, making disclosure all the more important.

- Experience indicates that failure to disclose the absence of insurance is a serious problem

The disclosure requirements are supported by comments noting a malpractice claim against an attorney where the client never would have used the particular attorney if the client had known the attorney had no insurance, and experience dealing with clients who learned *after* legal malpractice had harmed them that their attorneys had no liability insurance or other resources to satisfy claims, and felt betrayed and defrauded under the circumstances. Clients who learn after the fact that they have no recourse against an uninsured attorney whose mistakes have caused their losses do not feel they have been protected by the justice system and lose respect and confidence in the legal system.

- Requiring disclosure is appropriate to protect the public

The State Bar should do the "right thing." The State Bar should protect the public through the adoption of the proposed rules, and demonstrate that it acts in the best interest of the public, not the attorneys. The unsuspecting client may be left without a remedy if an attorney commits malpractice, and the client's interest should come first. Belated discovery by the client of the absence of insurance adversely affects the public,

which is a more important consideration than the adverse impact of the disclosure rules on uninsured attorneys.

- Failure to disclose the absence of insurance is a breach of fiduciary duty

Attorneys should uphold the highest of fiduciary duties to clients. Failure to make the insurance disclosure should be considered a breach of fiduciary duty.

- The burden of asking should not be on the client

Clients may not have the level of sophistication to enable them to ask for relevant information. The burden should not be on the client to ask about an attorney's insurance. An attorney owes an affirmative duty to the consumer to provide appropriate information to making a knowing decision.

- Protection of clients should be paramount

Attorneys are expected to offer protection to clients from adverse consequences. It seems inappropriate to place an attorney's pecuniary interests before protection of the client. On balance, it is the duty of attorneys to take the "high road." The client's right to be fully informed about relevant circumstances is more important to the integrity of the Bar than allowing a member to be silent on the issue.

- Uninsured attorneys will not suffer a direct financial impact

The proposed rules are about disclosure. The proposed rules do not require attorneys to maintain insurance and have no direct economic impact on uninsured attorneys.

II. RECOMMENDATIONS

The final Task Force recommendations are discussed below.

A. California should adopt an insurance disclosure requirement

The Task Force carefully considered the public comments and the arguments made in favor of and against the adoption of an insurance disclosure requirement. The Task Force repeatedly discussed concerns expressed about the proposed disclosure requirements, and recognized the need to balance those concerns against other competing factors. Ultimately, the view disfavoring any insurance disclosure requirement did not prevail. The Task Force concluded that an insurance disclosure requirement would result in better-informed consumer decisions and advance the important goal of consumer protection, and that the benefits outweighed the concerns expressed against adopting any such requirement. In reaching this conclusion, the Task Force considered the specific elements of the insurance disclosure requirements (discussed below) and the companion proposals for a more comprehensive insurance-

related package (also discussed below), which form integral parts of the Task Force recommendations.

1. The required insurance disclosure should be made a) directly to the client; and b) to the State Bar, which will make the information publicly available

The Task Force considered the two insurance disclosure models that states are currently using: 1) direct disclosure to the client; and 2) disclosure to the State Bar (which in most but not all states is followed by public disclosure of the information). The Task Force viewed disclosure *solely* to the State Bar as inadequate, concluding that this model is less likely to result in the information getting to the clients, particularly the least sophisticated clients who may have the greatest need for that information. The Task Force disfavored placing the burden on the consumer to seek and obtain information concerning an attorney's insurance coverage, and concluded that attorneys should be required to take affirmative steps and make the insurance disclosure directly to the client.

The Task Force concluded that disclosure to the State Bar would be appropriate, if required *in addition to* direct disclosure to the client. Members of the Task Force noted the advantages to a *potential* client of disclosure to the State Bar, followed by public availability of the information. Direct disclosure by an attorney to the client may not occur until the time of the actual engagement. If insurance information is made available to the public on the State Bar's website, potential clients would be able to ascertain whether an attorney is uninsured *before* deciding whether to contact the attorney about a potential engagement. In addition, requiring disclosure to the State Bar may be a useful way of assisting the State Bar in tracking information pertaining to member maintenance of professional liability insurance, and helping it to address other related issues, including the question of affordable insurance.

The Task Force ultimately decided to recommend two companion insurance disclosure rules, one requiring direct disclosure to the client, and the other requiring disclosure to the State Bar, followed by public availability of the information. If adopted, this dual disclosure requirement would be unique.[18] The Task Force decided to recommend a dual disclosure requirement in order to maximize consumer protection and a client's right to know.

[18] South Dakota requires both direct disclosure to the client and disclosure to the State Bar in an annual report, but the information reported to the State Bar is not made publicly available. If the proposed rules are adopted, California would be the only state to require direct disclosure to the client and disclosure to the State Bar, followed by public availability.

2. Attorneys should be required to make the insurance disclosure to clients – directly, and indirectly through the State Bar – only when they know or should know that they do *not* have by professional liability insurance

The Task Force considered whether the proposed new rules should require attorneys to disclose to clients – directly, or indirectly through the State Bar – whether they do or do not have professional liability insurance, or whether disclosure should be required *only* if an attorney does *not* have insurance. The Task Force recognized that requiring disclosure of the presence *or* absence of insurance coverage would raise the issue of insurance coverage at the outset of the attorney-client relationship in all cases. The Task Force also considered whether this approach would provide clients with more information than a requirement to disclose only the absence of insurance coverage.

Ultimately, the Task Force expressed significant concerns about requiring disclosure of the presence of insurance. A bare statement by an attorney that he or she has professional liability insurance – without additional information – may not be meaningful and may be potentially misleading because it does not address 1) the applicable policy limits; 2) the scope of the coverage; 3) coverage limitations; 4) coverage exclusions; 5) the amount of the deductible under the policy; 6) the fact that the policy may have "wasting limits" (i.e, the amount of coverage is reduced by any defense costs that are expended); and 7) the potential significance of the claims-made nature of most professional liability insurance policies. These issues could affect individual clients differently, and it would be difficult to provide clear, accurate, and complete information at the outset of each engagement.[19]

Because of these concerns, the Task Force recommends the adoption of rules that would require disclosure to a client only if an attorney knows or should know that he or she does *not* have professional liability insurance. One rule would require direct disclosure of that information to the client.[20] The second rule would provide that the State Bar will identify individual attorneys who inform the State Bar that the do *not* have insurance, by making that information publicly available. The Task Force concluded that this approach will provide basic, meaningful information that a client or potential client will be able to consider.[21]

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[19] As discussed in Section II.B, below, the Task Force recommends that issues such as these be addressed in a public education component that is made part of an insurance disclosure package.

[20] As discussed in Section I.F.3, above, the Task Force revised the initial proposal by deleting the requirement of notifying "existing" clients. The Task Force concluded that requiring direct notice to a new client and a returning client with a new engagement strikes the proper balance.

[21] In other states, the requirement to inform a client about the absence of insurance is triggered if an attorney does not maintain insurance *of at least certain limits*. Similarly, the insurance disclosure requirement originally added to the Business and Professions Code in 1992 was tied to certain policy limits. The Task Force does not favor an approach along these lines, as it could result in unnecessary complexity and confusion about coverage.

3. The insurance disclosure requirement should be created and enforced through two companion rules, a new Rule of Court and a new Rule of Professional Conduct

Under the approach of the ABA Model Court Rule, failure to disclose the required information on an attorney's annual registration statement in a timely fashion is grounds for administrative suspension, and supplying false information subjects an attorney to appropriate disciplinary action. Under the approach requiring direct disclosure to the client, the model has been a rule of professional conduct, which forms the basis for invoking the disciplinary process if the rule is violated. The Task Force considered these two models, in addition to the previous model under the Business and Professions Code, which made the disclosure obligation part of the fee agreement. By statute, failure to comply with that obligation rendered the fee agreement voidable at the option of the client, with the attorney then entitled to collect a reasonable fee.

The Task Force concluded that both of the insurance disclosure models now in use should be followed. The Task Force recommends that the proposed rule requiring direct disclosure be contained in a new Rule of Professional Conduct. A violation of that rule would implicate all the remedies that otherwise apply to a violation of the Rules of Professional Conduct. The Task Force further recommends that the proposed rule requiring disclosure to the State Bar be contained in a new Rule of Court, providing that 1) a member who fails to comply with the rule in a timely fashion may be suspended from the practice of law until such time as the member complies; and 2) a member who knows or should know that the information supplied in response to the rule is false will be subject to appropriate disciplinary action. [22]

4. Attorneys who are employed as government lawyers or in-house counsel and do not represent or provide legal advice to clients outside that capacity should be exempt from the insurance disclosure requirements

The ABA Model Court Rule and many of the rules adopted in other states contain exemptions from the applicability of the insurance disclosure rules. The two most common exemptions are government lawyers and in-house counsel, and those exemptions are expressed in slightly different ways in different rules. The Task Force recommends those same two exemptions for both the Rule of Court and the Rule of Professional Conduct, and proposes that both rules include a comment clarifying the scope of the exemptions.

Several public comments argued in favor of other exemptions, including attorneys who offer pro bono or low cost legal services, attorneys working in legal aid, and attorneys whose income is below a designated amount. A potential exemption for pro bono attorneys was raised during the second Task Force meeting. State Bar staff to the Task Force subsequently conferred with State Bar staff in the Office of Legal

[22] Suspension under the proposed Rule of Court would be a non-disciplinary, administrative suspension, similar to the remedy for failure to comply with a member's MCLE requirements.

Services, Access & Fairness Programs, and reported back to the Task Force on this issue. The preliminary staff recommendation, as reported to the Task Force, was not to include a pro bono exemption, primarily because 1) it would provide pro bono clients with less information about an attorney's insurance coverage than paying clients, a policy that typically would be disfavored; and 2) the concept of "pro bono" has been difficult to define with precision, and may be subject to debate. If pro bono services are being provided under the umbrella of a qualified provider that has professional liability insurance covering the attorney's services, this does not appear to be an issue. If, however, an attorney is providing legal services on a pro bono basis to a client, and is not covered by professional liability insurance for those services, it appears as though the insurance disclosure rules should apply. The Task Force considered these issues, and does not recommend adding a "pro bono" exemption to the proposed rules.

Similar reasoning applies to the other proposed exemptions. This is not a mandatory insurance proposal. Rather, it is a proposal to disclose important information – the absence of insurance – to clients and potential clients. Low-income clients, indigent clients, and clients of low-income attorneys are entitled to the same level information as other clients, and the same protections should apply. The exemptions that the Task Force has recommended are unique. They would not apply if an attorney represents clients outside the exempt capacities. If an attorney is employed directly by and provides legal services directly for an entity – whether private or governmental – that entity presumably knows whether the attorney is or is not covered by professional liability insurance, so the disclosure to that entity would serve no purpose.

B. Adoption of an insurance disclosure requirement should be part of a broader insurance-related package

The Task Force recommends adoption of an insurance-related package that goes beyond the proposed rules themselves. The first recommended expansion is an educational component. As noted in the public comments, professional liability insurance differs in ways from other forms of insurance, and the average consumer may not be familiar with those differences or the significance of certain issues concerning an attorney's professional liability insurance. In many public comments, this point formed the basis of an opposition to the adoption of the proposed insurance disclosure rules. The Task Force concluded that the issues that were raised were insufficient to outweigh the adoption of the proposed rules. At the same time, the Task Force believes that consumer education about professional liability insurance should complement any reporting requirement, to provide additional information about insurance-related issues and make the disclosure requirements more useful to consumers.[23] The Task Force therefore recommends that the State Bar develop public educational material

[23] The Task Force discussed an approach that would consist solely of general consumer education about professional liability insurance, but would not have any disclosure requirement. There was a consensus against an education-only model without a disclosure requirement. The Task Force concluded that education, by itself, would be an insufficient means of alerting and protecting the public.

concerning professional liability insurance, to complement any insurance disclosure requirement.[24]

The Task Force's second recommended expansion relates to affordable insurance and consumer harm resulting from uninsured attorneys. Many comments expressed the view that an insurance disclosure requirement is unfair, *unless* affordable insurance is made available to all attorneys. Others opposed an insurance disclosure requirement, but contended that, as an *alternative*, the State Bar should explore methods of making professional liability insurance more affordable and available to all attorneys. To address the issues that have been raised, the Task Force recommends that the Board of Governors, as part of an expanded insurance-related package, study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys.

C. The State Bar should assess the effect of the proposed rules and prepare a report on that effect within three to five years after adoption of the proposed rules

As discussed above, the public comments raise a number of potential adverse consequences resulting from adoption of the proposed insurance disclosure rules. In order to monitor those issues, the Task Force recommends that the State Bar assess the effect of the proposed new rules and prepare a report on that effect within three to five years after the proposed rules are adopted.

III. FISCAL/PERSONNEL IMPACT

The fiscal and personnel impact are unknown at this time. The mere adoption of the proposed Rule of Professional Conduct does not involve an unbudgeted fiscal or personnel impact. The cost associated with the new Rule of Court is largely dependent on the mechanism by which the required attorney reporting is accomplished. If the State Bar is required to mail a form to each active member – likely to be separate and apart from the annual fee statement – and each active member is then required to fill out the form and mail it back to the State Bar, there would be additional postage costs and increased staff costs associated with receipt of the information and data entry. If, on the other hand, attorneys are able to enter the information online through the State Bar's member profile, there would be some programming costs, but they would be

[24] The Task Force did not discuss the content of the proposed educational information in detail. It noted that public educational material from other states could be reviewed as part of the process of developing material for California. Example of issues that could be addressed include 1) the potential significance of policy limits; 2) typical coverage limitations; 3) typical coverage exclusions; 4) deductibles; 5) "wasting limits"; and 6) the claims-made nature of most professional liability insurance policies. The information may also note that California attorneys are not required to maintain professional liability insurance, and encourage prospective clients to discuss certain insurance-related issues with an attorney before an engagement.

relatively minor compared to the costs of manual processing.[25] In either event, there will also be unknown staff costs that are required in order to perform routine compliance, monitoring, and auditing functions.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Operational issues relating to the new rules, if adopted, will need to be incorporated into the Board Book and Administrative Manual.

V. PROPOSED RESOLUTION

Should the Board of Governors approve the recommendations of the Insurance Disclosure Task Force, the following resolutions would be appropriate:

RESOLVED, following release for public comment, consideration of comments received, and upon recommendation of the Insurance Disclosure Task Force, that the Board of Governors approves the proposed amendment to Rule 9.6 of the California Rules of Court and proposed new Rule 9.7 of the California Rules of Court, in the form attached hereto as Attachment A, and directs that the proposed amendment and proposed new rule be transmitted to the California Supreme Court with a request that the Court adopt the same; and it is

FURTHER RESOLVED, following release for public comment, consideration of comments received, and upon recommendation of the Insurance Disclosure Task Force, that the Board of Governors adopts proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form attached hereto as Attachment B, and directs that the proposed new rule be transmitted to the California Supreme Court with a request that the Court approve the same; and it is

FURTHER RESOLVED, that the State Bar will develop public educational material concerning professional liability insurance, to complement any insurance disclosure requirement; and it is

FURTHER RESOLVED, that the State Bar, as part of an expanded insurance-related package, will study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys; and it is

FURTHER RESOLVED, that the State Bar will assess the effect of the proposed new insurance disclosure rules and prepare a report on that effect within three to five years after the California Supreme Court has 1) adopted the proposed amendment to Rule 9.6 of the California Rules of Court and proposed new Rule 9.7 of the California Rules of Court; and 2) approved proposed new Rule 3-410 of the California Rules of Professional Conduct.

[25] The agenda for the September 26, 2007 Board meeting includes consideration of proposed Rule of Court 9.8, to require online registration by attorneys.

Proposed Amendment to Rule 9.6 of the California Rules of Court
and
Proposed New Rule 9.7 of the California Rules of Court

(September 26, 2007)

California Rules of Court

Rule 9.6. Roll of attorneys admitted to practice

The State Bar must maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this state. Such records must include the information specified in Business and Professions Code sections 6002.1 and 6064, rule 9.7 of these rules, and other information as directed by the Supreme Court.

Rule 9.7. Disclosure of Professional Liability Insurance

(a) Each active member who is not exempt under subdivision (b) must certify to the State Bar in the manner that the State Bar prescribes:

(1) Whether the member represents or provides legal advice to clients; and

(2) If the member represents or provides legal advice to clients, whether the member currently has professional liability insurance.

(b) Each active member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity must certify those facts to the State Bar in the manner that the State Bar prescribes. Members who provide this certification are exempt from providing information under subdivision (a).

(c) Each member who transfers from inactive status to active status must provide the State Bar with the certification required under subdivision (a) or (b), as applicable, within thirty days of the effective date of the member's transfer to active status.

(d) A member must notify the State Bar in writing of any change in the information provided under subdivision (a) or (b) within thirty days of that change.

(e) The State Bar will identify each individual member who certifies under subdivision (a) that he or she does not have professional liability insurance by making that information publicly available upon inquiry and on the State Bar's website or by a similar method.

(f) A member who fails to comply with this rule in a timely fashion may be suspended from the practice of law until the member complies. If a member knows or should know that the information supplied in response to this rule is false, the member will be subject to appropriate disciplinary action.

Comment

Rule 9.7(b) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent or provide legal advice to clients outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to make information available to a client or potential client, through the State Bar, if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

Proposed New Rule 3-410 of the California Rules of Professional Conduct

(September 26, 2007)

California Rules of Professional Conduct

Rule 3-410. Disclosure of Professional Liability Insurance

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client at the time of the client's engagement of the member that the member does not have professional liability insurance. The notice required by this paragraph shall be provided to the client in writing.

(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity.

Discussion

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."

[4] Rule 3-410(D) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent or provide legal advice to clients

outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.